Nos. 75-636 and 75-672

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In the Supreme Court of the United States

OCTOBER TERM, 1976

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
PETITIONER

v.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

T.I.M.E.-D.C., INC., PETITIONER

v.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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No. 75-636

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OPINIONS BELOW

The opinion of the court of appeals (A.P. 1-44)* is reported at 517 F.2d 299. The final order of the district court entered on March 2, 1973 (A.P. 94-116), and the order amending the final order entered on March 19, 1973 (A.P. 117-118), are not officially reported. An order entered by the district court on December 13, 1971 (A.P. 45-49) is reported at 335 F.

*"A.P." refers to the Appendix to Petition for Certiorari filed by the International Brotherhood of Teamsters in No. 75-636.

Supp. 246. Other orders and opinions of the district court are not officially reported but are unofficially reported as follows:

> Order entered on January 20, 1972 (A.P. 50–55) 4 FEP Cases 875; 4 EPD ¶7881.
>
> Decree in Partial Resolution of Suit (consented to by the United States and T.I.M.E.–D.C.) entered on May 12, 1972 (A.P. 85–93), 4 EPD ¶7831.
>
> Memorandum Opinion entered on October 19, 1972 (A.P. 56–78), 6 FEP Cases 690; 6 EPD ¶8979.
>
> Supplemental Opinion entered on December [illegible], 1972 (A.P. 79–84), 6 FEP Cases 690, 703; 6 EPD ¶8979, p. 6161.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1975. The petitions for a writ of certiorari were filed on October 29, 1975, and November 6, 1975, respectively, and were granted on May 24, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly found, on the basis of statistical evidence and extensive pretrial and trial testimony concerning individual acts of discrimination, that T.I.M.E.–D.C. had engaged in a pattern of discriminatory employment practices against blacks and Spanish-surnamed persons in violation of Title VII of the Civil Rights Act of 1964.

2. Whether applications of a seniority system that penalize incumbent employees who transfer to job

classifications from which they previously were discriminatorily excluded and perpetuate the effects of a pattern of exclusion of blacks and Spanish-surnamed employees from higher paying, more attractive, traditionally white jobs, violate Title VII.

3. Whether, in a case where a pattern and practice of employment discrimination had been demonstrated, an incumbent minority employee seeking rightful place seniority relief who is a member of the affected class (1) is entitled to a rebuttable presumption that he was a victim of discrimination, and (2) need not necessarily have applied for a vacant rightful place job to be entitled to relief.

4. Whether the court of appeals correctly held that, in the circumstances of this case, the rights of members of the affected class to compete for future vacancies at their home terminals or elsewhere should not be subordinated either to the rights of employees transferring from other terminals or to the rights of employees with less seniority who are on layoff.

STATUTORY PROVISIONS INVOLVED

Several pertinent provisions of Title VII of the Civil Rights Act of 1964 are set forth in the Appendix to Petition for Certiorari in No. 75–636 (A.P. 119–124).

In addition, Section 706(g) of Title VII, 78 Stat. 261, as amended, 42 U.S.C. (Supp. V) 2000e–5(g), provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful

employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate.

STATEMENT

These petitions arise from two Title VII cases brought by the United States pursuant to Section 707 of the Civil Rights Act of 1964, 78 Stat. 261–262, as amended, 42 U.S.C. (Supp. V) 2000e–6 (A.P. 122) [1] alleging a pattern of employment practices that discriminate against blacks and Spanish-surnamed Americans on the grounds of race and national origin. The first suit, filed on May 15, 1968, in the United States District Court for the Middle District of Tennessee, Nashville Division (A. 2),[2] alleged discriminatory hiring, assignment, and promotion practices against blacks at the Nashville terminal of T.I.M.E. Freight, Inc., a common carrier by motor freight (A.P. 3).

The second suit was brought on January 14, 1971, against T.I.M.E.-D.C., Inc. ("T.I.M.E.-D.C." or "the Company") and the International Brotherhood of Teamsters ("Teamsters") in the United States Dis-

[1] On May 24, 1974, the United States Court of Appeals for the Fifth Circuit entered an order substituting the Equal Employment Opportunity Commission for the United States as plaintiff (see 42 U.S.C. (Supp. V) 2000e–6 (c) and (d), A.P. 123–124) but retaining the United States as a party for purposes of jurisdiction, appealability, and related matters.

[2] "A." refers to the Appendix filed jointly in Nos. 75–636 and 75–672.

trict Court for the Northern District of Texas, Lubbock Division (A. 2, 4–8). T.I.M.E.-D.C., a successor of T.I.M.E. Freight, Inc., is an interstate motor carrier of general commodities and is the product of ten mergers over a 17-year period (A.P. 5). T.I.M.E.-D.C. currently has 51 terminals and operates in 26 states and three Canadian provinces (A. 43). The Teamsters is an unincorporated labor organization, and certain locals chartered by it are parties to collective bargaining agreements with T.I.M.E.-D.C. (A. 42). All of T.I.M.E.-D.C.'s line drivers and the vast majority of its city employees and servicemen work under collective bargaining agreements negotiated for them by various committees of the Teamsters (A.P. 6, 17).[3] The complaint against T.I.M.E.-D.C. and the Teamsters alleged a pattern and practice of hiring, assignment, and promotion discrimination against blacks and Spanish-surnamed Americans throughout the T.I.M.E.-D.C. system; it specifically alleged that the seniority system to which the defendants are parties violates Title VII by perpetuating the effects of past discrimination (A. 6).

The two suits were consolidated in the United States District Court for the Northern District of Texas,

[3] The National Master Freight Agreement is reproduced in full in Pl's Ex. 203(a) (A. 284), which is entitled "National Master Freight Agreement and Southern Conference Area Over-the-Road Supplemental Agreement." Other area supplemental agreements in Pl's Exs. 203(a), 203(b), 203(c) and 203(d) are also part of the same National Master Freight Agreement. The National Master Freight Agreement and Southern Conference Area Over-the-Road Supplemental Agreement is also contained in Pl's Ex. 202, portions of which are printed in the joint appendix (A. 795–840).

Lubbock Division (A. 3), and a trial was held in May 1972. On May 12, 1972, the district court entered a decree consented to by the United States and T.I.M.E.-D.C. ("Decree in Partial Resolution of Suit") that resolved a number of issues relating to T.I.M.E.-D.C.'s affirmative obligation to recruit and hire qualified blacks and Spanish-surnamed Americans, and monetary compensation for those blacks and Spanish-surnamed Americans alleged to be individual and class victims of discrimination (A.P. 85–93). Left unresolved were whether the defendants were in violation of Title VII, the lawfulness of certain aspects of the seniority system, and the appropriate non-monetary relief.

A. PROCEEDINGS IN THE DISTRICT COURT

In a memorandum opinion dated October 19, 1972, and a supplemental opinion of December 6, 1972 (A.P. 56–84), the district court issued its findings and conclusions based on the trial of the remaining issues. It held that T.I.M.E.-D.C. had engaged in a pattern and practice of discrimination in violation of Title VII and that the defendant unions had also violated the Act by giving force and effect to a seniority system which perpetuated the effects of employment discrimination.

1. Evidence

The district court based its conclusions on a combination of statistical evidence and pretrial and trial testimony, the core of which can be briefly summarized as follows:

The relevant non-managerial employees at T.I.M.E.–D.C. are divided into three basic job classifications: (a)

line driver; (b) city driver, dockman and hostler (known as "city operation" jobs); and (c) serviceman (which includes tireman) (A.P. 5–6).[4] Line drivers (also known as road drivers) transport freight in tractor-trailer units over-the-road between Company terminals. City drivers pick up and deliver freight within a specified radius of a terminal. Dockmen (also known as checkers) load, unload and check freight at the terminal's dock. Hostlers drive tractor-trailers around the terminal yard and move trailers in and out of the dock.[5] Servicemen fuel, wash, and grease trucks and change tires. They also hook and unhook road and city tractors and trailers and drive them into and out of the shop.[6]

Generally, T.I.M.E.–D.C. and its predecessors had no minimum educational requirements for line driver, city driver, hostler, dockman or serviceman.[7] The

[4] The employees in these classifications are, with few exceptions, covered by separate collective bargaining agreements, or separate supplemental agreements to the National Master Freight Agreement. See Pre-Trial Order Appendix B (A. 132–171). They accumulate seniority on separate seniority rosters. (A.P. 6).

[5] Dep. of Kenneth N. Gibbs, Jr., Terminal Manager (Nashville), pp. 28–29. The depositions and summaries of depositions were admitted in evidence as exhibits and were not formally retranscribed as part of the trial transcript (A. 387–390, 277–278).

[6] Dep. of Dallas R. Anderson, Regional Maintenance Manager (Nashville), pp. 117–118, 136.

[7] Summary of dep. of James W. Frazier, Terminal Manager (Hayward), p. 13; summary of dep. of Tobey Beck, Ass't. Terminal Manager (Los Angeles), p. 9; summary of dep. of Jackson B. Stroud, Operations Manager (Atlanta), pp. 2, 4 (all in Pl's Ex. 240 (A. 277–278)); dep. of Homer W. Burns, former Shop Superintendent (Nashville), p. 345.

experience requirement generally for line driver was experience driving tractor-trailer units and, for city driver, experience driving the type of unit (tractor-trailer or straight truck) to be operated on the job.[8]

City operation jobs normally pay more than the job of serviceman;[9] however, both job categories usually pay less than the job of line driver. In 1969, line drivers averaged from $1,300 to $5,500 more per year than city drivers (A. 898). As the district court found (A.P. 59), line driver jobs are considered more desirable than city driver jobs because the line drivers generally receive higher pay and are not required to engage in the physically demanding tasks of loading and unloading the trucks (see A. 339–340).

As of March 31, 1971, T.I.M.E.–D.C. had 6,472 employees, of whom 314 (5%) were black and 257 (4%) were Spanish-surnamed Americans (A. 43). A large majority of the black (83%) and Spanish-surnamed American (78%) employees were assigned to city operation (city driver, dockman, hostler) or serviceman (including tireman) jobs (A. 43–48). By contrast, less than 39 percent of the 5,901 employees who

[8] Dep. of Kenneth N. Gibbs, Terminal Manager (Nashville), pp. 27–28; dep. of William E. Franzen, Highway Operations Manager (Denver), pp. 3–4, 10–11; dep. of Anthony W. Lillywhite, Driver Supervisor (Los Angeles) [5–18–71], pp. 6–12; summary of dep. of Jackson B. Stroud, Operations Manager (Atlanta), pp. 2–4 (in Pl's Ex. 240 (A. 277–278)).

[9] See Pl's Ex. 230 (Los Angeles, Nashville, Oklahoma City and San Francisco terminals). At the Denver terminal, servicemen receive a higher rate of pay than city operation employees. Pl's Ex. 230, Tab D.

were other than black or Spanish-surnamed were assigned to such positions. The great majority of non-minority employees held line driver, office and supervisory, and mechanic jobs (A. 43–48). Of the 2,545 persons employed as city drivers, dockmen, and hostlers, 195 (or 7.7%) were black, and 178 (or 7.0%) were Spanish-surnamed (A. 43–44, #14).

Although T.I.M.E.–D.C.'s major terminals employing line drivers are located in metropolitan areas having substantial minority population (A.P. 18–19, 68–72), of the 1,828 line drivers at the Company as of March 31, 1971, only 8 (or 0.4%) were black and only 5 (or 0.3%) were Spanish-surnamed American. None of the eight blacks was employed as a line driver until 1969, although the government's Title VII suit with respect to the Nashville terminal had been filed on May 15, 1968 (A. 43–44 #14).[10] With one exception, no black was ever employed on a regular basis as a line driver by T.I.M.E.–D.C. or any of its predecessor companies prior to 1969 (A.P. 20–21).

The testimonial evidence showed that the statistics indicating disparate employment opportunities for blacks and Spanish-surnamed individuals did in fact reflect discriminatory hiring practices. The testimony showed that numerous qualified black and Spanish-surnamed persons who sought initial assignment or transfer to line driving positions at various terminals of the Company were denied such jobs after being

[10] A.P. 19; Pl's Ex. 204. Ex. 204 is a printout showing all of T.I.M.E.–D.C.'s employees as of March 31, 1971, and it indicates, by terminal, each employee's name, job employed date and ethnic code (A. 279–280). The ethnic codes appear on the front sheet of the exhibit.

given false and misleading information about requirements, opportunities, and application procedures (A.P. 60–61, 24).

The evidence concerning the Nashville and Memphis terminals illustrates the manner in which statistics and testimonial evidence combined to reveal a pattern and practice of discrimination. For example, as of March 31, 1971, the statistics on employee complement by job category at the Nashville terminal revealed that blacks had not obtained any of the 181 line driver and city operator jobs.[11] The Terminal Manager stated in 1966 that blacks had never been considered for any job except serviceman at the terminal (A. 374–376, 379).[12] The district court also found (A.P. 61) that the Company has trained whites, but not blacks, to be mechanics, partsmen and shop supervisors at the Nashville terminal.[13] The same statistical pattern of exclusion of blacks from line driving jobs was evident at the Memphis terminal, where no line driver jobs went to blacks prior to 1969 and only 3 of 104 such jobs were held by blacks thereafter.[14] Yet, from about 1956 until sometime in 1958, the Company permitted white employees from the city operation (and at least one

[11] Pl's Ex. 204, pp. 83–94.

[12] The job of serviceman (including tireman) at the Nashville terminal pays less than the jobs of dockman, hostler, city driver, partsman, mechanic and line driver. Pl's Exs. 230 (Nashville); 231 (A. 898).

[13] Dep. of James E. Mince (Nashville), pp. 182–189; Pl's Ex. 206; Pl's Ex. 89 (to Nashville deps.).

[14] Pl's Ex. 204 pp. 57–68.

serviceman) to drive extra trips on the line,[15] and a number of these white employees later became regular line drivers.[16] Several black city drivers at the terminal requested that they also be permitted to drive on the line during the period 1956–1958; however, they were not allowed to do so.[17] Testimony indicated that the Memphis terminal manager eventually stopped the practice because black city drivers were asking to drive such trips and he would never permit blacks to drive on the road.[18]

The district court found that the seniority system resulting from the collective bargaining agreements acted to perpetuate T.I.M.E.-D.C.'s discriminatory employment pattern (A.P. 61). Under that system, an employee who moves from a job covered by one collective bargaining agreement to a job covered by another collective bargaining agreement at any of the Company's terminals must give up his seniority for all

[15] Dep. of W. G. Gately, p. 5; dep. of Arthur L. Thornton, p. 6; dep. of Fontaine E. Yount, Jr., p. 20 (all taken at Memphis).

[16] The record shows that the following whites transferred from city operation or serviceman jobs to line driver at the terminal during the period 1956–1958: John P. Poston, Jessie L. Robertson, Jack P. Jones, Ruby Arnold, J. W. Stanford, Max Seeley. *Sources:* Summary of dep. of Barton O'Brien, Terminal Manager (Memphis), pp. 10–12, in evidence as part of Pl's Ex. 240 (A. 277–278); Pl's Exs. 177, 178, 179, 182, 180 (to Memphis deps.); dep. of Fontaine E. Yount, Jr., pp. 18–19; dep. of W. G. Gately, pp. 21–22 (all taken at Memphis).

[17] Dep. of Arthur L. Thornton, pp. 5–8; dep. of James H. Walker, pp. 6, 9; dep. of James L. McNeal, pp. 5–6; summary of deps, of Charles D. Glover, pp. 1–2, and R. D. Parker, p. 2, in Pl's Ex. 240 (A. 277–278) (all taken at Memphis).

[18] Dep. of Fontaine E. Yount, Jr., pp. 24–25; dep. of W. G. Gately, pp. 16, 19–20 (taken at Memphis).

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purposes except fringe benefits (A. 48). City operation and serviceman jobs are covered by collective bargaining agreements (or area supplemental agreements to the National Master Freight Agreement) different from those covering line driver jobs (A. 42, 132–171). Consequently, if qualified black or Spanish-surnamed American employees desire to move to vacancies in the job of line driver, they are required to relinquish all of their accumulated seniority for purposes of job bidding and protection against layoff (A.P. 7).[19]

These seniority provisions are embodied in a National Master Freight Agreement and area supplements, negotiated every three years by the National Over-the-Road and City Cartage Policy and Negotiating Committee of the Teamsters, and in various area supplements to that national agreement negotiated by the National Committee and various area committees

[19] The seniority rules have implications for job transfer between geographic locations as well as between job categories. Employees of T.I.M.E.–D.C. can normally exercise their seniority only at the terminal where they are originally hired. However, line drivers domiciled at those terminals of the Company covered by the Southern Conference Area Over-the-Road Supplemental Agreement work under "modified system seniority". Under that system, if a line driver is laid off, he can exercise his seniority to take a line driver job at any other terminal covered by the agreement, if there is either a vacancy or a line driver junior to him at the other terminal. If there is no vacancy, but only a junior line driver at the other terminal, the transferring line driver can "bump" that junior line driver out of his job (A. 49). Modified system seniority also requires that, when a terminal has an opening in a line driver job, it must first offer the job to laid off line drivers at all other terminals covered by the Southern Conference Supplemental Agreement before filling the opening with any other person (A. 49–50).

of the Teamsters. The Negotiating Committee represents locals of the Teamsters, including those with which T.I.M.E.–D.C. has agreements, for purposes of collective bargaining with the motor carriers. The Committee is a party to both the National Master Freight Agreement and its area supplemental agreements (A. 797). Each local union gives the Committee a power of attorney to negotiate on its behalf (A.P. 17). Since the Teamsters is a highly centralized international union (A.P. 17), most of the Negotiating Committee's members are either officers or employees of the International, including its chairman, Frank E. Fitzsimmons, who is the General President of the International (A. 649–651). The Area Conferences of the Teamsters are "subject to the unqualified supervision, direction and control of the General President" and they must function under the rules prescribed in bylaws approved by the General President (A. 787). Each local union must affiliate with the Area Conference having jurisdiction over it (A. 788). The bylaws of each local union are also subject to the approval of the General President; and if a majority of local unions vote to hold area, national or industry-wide negotiations, all involved local unions "must participate" and "shall be bound" by the contract if approved by the majority of the votes cast by the membership covered by the contract proposal (A. 751, 789).

2. Decision of the District Court

The district court's memorandum opinion of October 19, 1972, found "[a]ll of the evidence * * * ample to show by a preponderance of the evidence"

that T.I.M.E.–D.C. was engaged in a pattern and practice of discrimination in violation of Title VII (A.P. 61–62).[20] It also found that the union defendants were in violation of Title VII for their part in negotiating contracts with the Company, which "while being neutral on their face, do, however, operate to impede the free transfer of minority groups into and within the company" (A.P. 61–62).

The government had submitted a list of incumbent employees as of March 31, 1971, for whom it sought transfer and seniority relief, basically composed of blacks and Spanish-surnamed Americans assigned to city operation and serviceman jobs at those company terminals which had a line driver operation.[21] The district court found that all of the 358 incumbent black and Spanish-surnamed American employees of the Company for whom the government sought relief were members of an affected class of discriminatees and it ruled that all of these individuals were entitled to transfer, if qualified, to future vacancies in jobs from which they had been excluded as a class (A.P. 62–

[20] The relief ordered by the district court in its opinions of October 19 and December 6, 1972, was embodied in a final order which it entered on March 2, 1973, and later amended in part on March 19, 1973 (A.P. 94–118).

[21] The list included minority employees hired at terminals that had a line driver operation during the period in which T.I.M.E.–D.C. was practicing a plan and pattern of discrimination. Relief was not sought for blacks and Spanish-surnamed Americans hired at a particular terminal after the date on which the terminal had employed a minority group member in a line driver position. Nor was relief sought for minority employees hired during the period after the last white was hired as a line driver at that particular terminal.

65).[22] The district court ordered that all discriminatees who transfer would retain their company seniority for fringe and retirement benefits (A.P. 66).[23]

However, the district court qualified the class relief in several respects. First, it ruled that a job opening would not be treated as a vacancy for transfer relief purposes where it can be filled by a person on the seniority roster where the job occurs who has been on layoff for not longer than three years (A.P. 81, para. IV).[24] Second, based upon the evidence submitted by

[22] The district court denied relief to three blacks and one Spanish-surnamed American (see Appendix D of memorandum opinion, A.P. 78). However, these four persons were applicants for jobs at the Company and not incumbents. In a supplemental opinion of December 6, 1972 (A.P. 80), the district court granted relief to these four persons, as well as to three whites originally denied relief in Appendix D of its memorandum opinion.

[23] The district court had previously ruled that the Teamsters International was a proper party to represent and defend the seniority status of its members and that the Teamsters' locals which represented T.I.M E.–D.C. employees were not indispensable parties (A.P. 50–55). The court of appeals subsequently affirmed those rulings (A.P. 16–18).

[24] This ruling, however, simply incorporated the existing policy under the collective bargaining agreements in effect at the Company which cover employees in jobs represented by the Teamsters or its affiliated locals. These agreements provide that individuals on layoff for up to three years have a prior right to be recalled when openings again occur in those jobs. See, *e.g.*, National Master Freight Agreement, Art. 5, Sec. 1 (A. 804); Southern Conference Area Over-the-Road Supplemental Agreement, Art. 42, Sec. 1 (A. 823); Pl's Ex. 203(b), Western States Area Over-the-Road Supplemental Agreement, Art. 43, Sec. 1(a), (d), pp. 11, 12; Pl's Ex. 203(c), Central States Area Over-the-Road Supplemental Agreement, Art. 43, Sec. 1, p. 94.

the government in proving the pattern and practice of discrimination, the court divided the minority incumbents into three subgroups reflecting their individual "degree of injury" (A.P. 62–64). Only with respect to 29 minority employees, whose testimony was actually placed into evidence, did the court find that "clear and convincing" proof of discrimination which, in its view, alone merited a carryover of seniority for purposes of bidding for jobs and protection against layoffs (A.P. 64).[25] Even for these individuals, seniority carryover was limited to July 2, 1965, the effective date of Title VII, because the effect on innocent non-minority employees of full seniority carryover outweighed "the advantage of restoring, as nearly as possible, an individual to the position that he would have enjoyed had there never been discrimination" (A.P. 63).[26]

The court established a second subgroup made up of individuals who "were likely harmed" (A.P. 64), but as to whom the evidence which the government had presented was "not sufficient to show clear and convincing specific instances of discrimination or harm resulting therefrom" (A.P. 64). Their seniority carryover was limited to January 14, 1971, the filing date of the Texas suit. As to the third subgroup, the court was unable to determine whether "these individuals were either harmed or not harmed individually" (A.P. 65). It limited their relief to priority in filling vacancies, refusing to award retroactive seniority (*ibid.*).

[25] The names of these 29 minority employees and the relief given them are set forth in Appendices B and C to the memorandum opinion (A.P. 73–77). A total of 34 minority employees were granted relief in Appendices B and C; however, 4 of these (Vestal, Stinson, Hix and Barnes) were applicants for jobs at the Company rather than incumbents and a fifth (Zeno) was given relief only with respect to the equipment assigned him.

[26] In its memorandum opinion, the district court established July 2, 1964, as the earliest date for seniority carryover purposes (A.P. 64). It subsequently changed this date to July 2, 1965, in its supplemental opinion of December 6, 1972 (A.P. 82).

B. THE DECISION OF THE COURT OF APPEALS

On appeal, the court of appeals affirmed the district court's finding that both T.I.M.E.-D.C. and the Teamsters had engaged in a pattern of employment practices violative of Title VII. The court stated: "[o]ur careful consideration of the record has convinced us that * * * the District Court was entitled to conclude that the defendants have failed to rebut the plaintiffs' prima facie case of employment discrimination * * * that the defendants have engaged in an extensive pattern of employment practices unlawful under Title VII and that strong remedial action is warranted" (A.P. 29).

However, the court of appeals held that the district court had erred in using testimony that the government had introduced in establishing the pattern of discrimination to delimit the remedies available to individual members of the affected class. Instead, the court of appeals ruled, the structure of a pattern and practice suit precludes any requirement for "individualized proof for every member of a class here numbering 400 but frequently involving thousands" (A.P.

34).[27] Consequently, the appellate court reversed the district court's gradations of the affected class into subgroups of differing transfer and seniority rights (A.P. 34). "[F]or all members of the class there should be full company employment seniority carryover for bidding and layoff purposes * * *" (A.P. 38).

The court of appeals also rejected the July 2, 1965 limitation on seniority carryover. Instead, it made all relief subject to the "qualification date principle" (A.P. 38), whereby the seniority carryover date for bidding and layoff purposes is determined by (1) the date the incumbent minority employee possessed the experience necessary to qualify for that job, and (2) the date thereafter when a vacancy existed (A.P. 32, 38).[28] The court of appeals did not specifically discuss

[27] As the court of appeals noted (A.P. 29–31, n. 33), the appeal pertained to the rights of incumbent employees who were members of the affected class rather than the rights of rejected applicants for new hire. (The district court had given relief to some individuals in the latter category, and not to others.) The court of appeals did direct, however, that the district court have great flexibility on remand to consider former applicants who never became incumbents, particularly in light of the fact that this Court had granted certiorari in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (decided subsequent to the court of appeals' decision here).

[28] See, A.P. 32, n. 35 which in turn refers to *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 63 n. 29 (C.A. 5). The Fifth Circuit has further clarified its position in *Sagers* v. *Yellow Freight System, Inc.*, 529 F. 2d 721, 732.

The court of appeals further recognized that if an affected class member had been denied the opportunity to take tests or otherwise obtain the requisite experience for a job in the past, his qualification date for purposes of determining seniority carryover should normally be fixed as of the date in the past

petitioners' opportunity to prove that some individuals were not in fact victims of previous discrimination (cf. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772), but merely held that showings of individual injury were not required for every member of the affected class in the liability stage and that "[w]hatever evidentiary hearings are required for individuals can be postponed to the remedy" (A.P. 34).

Finally, the court of appeals temporarily modified the seniority agreements in two respects. The court ruled that to allow laid off line drivers a three-year priority on filling future openings in line driver jobs over the bidding rights of more senior members of the affected class would unduly impede the eradication of past discrimination. Hence, it directed that when a vacancy which is not purely temporary arises in a line driver job, a member of the affected class may compete against any line driver on layoff for that vacancy on the basis of his carryover seniority date, with the opening to go to the competing individual with the greatest seniority (A.P. 41). The court of appeals also held that all members of the affected class are to have preference in filling future vacancies in line driver jobs at their home terminals ahead of laid-off line drivers transferring in from other terminals (A.P 42).

on which he could have qualified for the job had he been given the opportunity to establish his qualifications (A.P. 32, n. 34).

This refinement of the "qualification date principle" is necessary to cover situations such as existed at the Nashville terminal, where the district court found that the Company had provided training to whites, but not blacks, to enable them to become mechanics, partsmen and shop supervisors (A.P. 61).

SUMMARY OF ARGUMENT

A. Petitioner T.I.M.E.–D.C. challenges the concurrent factual determinations, reached by the court of appeals and the district court, that T.I.M.E.–D.C. engaged in a pattern and practice of discrimination in the hiring and transfer of its employees. However, the undisputed evidence indicates enormous statistical disparities, in the higher paying and more desirable line driver positions, between the employment of blacks and Spanish-surnamed persons, on the one hand, and non-minority individuals, on the other. For example, only one percent of the approximately 1,800 line driver jobs were held by these minority individuals in 1971, even though many of the company's terminals are located in areas with large minority populations. At the same time, large numbers of apparently qualified blacks and Spanish-surnamed persons were relegated to less desirable city operation and servicemen jobs. In the absence of any persuasive explanation for these flagrant statistical disparities, the courts below were entitled to draw an inference of discrimination, and shift to the defendant the burden of showing that a pattern and practice of discrimination had not occurred.

However, neither court below based its conclusion that a pattern and practice of discrimination existed on statistical evidence alone. The record was replete with testimonial evidence that qualified minority applicants who sought line driver jobs had their requests ignored, were given false and misleading information, or were not considered on the same basis as whites.

Petitioner T.I.M.E.–D.C. has failed to make the exceptional showing of error that alone would justify this Court's review of these findings based upon the entire record and unanimously concurred in by both courts below.

B. Both courts also correctly concluded that the pattern of racially segregated departments which was established by T.I.M.E.–D.C. is perpetuated by a departmental seniority system embodied in collective bargaining agreements negotiated by the International Brotherhood of Teamsters. Under this system a victim of discrimination who wishes to transfer to a line driver job must forfeit the seniority which he has accrued through service in the only company job that he was permitted to obtain. Because this loss of bidding rights and protection against layoff would threaten a transferring employee's economic survival, the seniority system acts as a substantial impediment to transfer. Even if he transfers, the minority individual is placed forever behind his white contemporaries with respect to the terms and conditions of his employment and the allocation of scarce employment benefits. Petitioner International Brotherhood of Teamsters nevertheless claims that because the seniority system was itself negotiated in good faith without racial intent and is a *bona fide* seniority system within the meaning of Section 703(h) of Title VII there is no violation of Title VII.

Title VII is directed at the consequences of employment procedures, and practices "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of

prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430. Section 703(h) of Title VII, 78 Stat. 257, 42 U.S.C. 2000e–2(h), was intended to protect the seniority system as a governing principle in labor management relations. Neither its terms nor its legislative history require its application to claims of incumbent minority employees who are locked into less desirable jobs by departmental seniority systems which perpetuate the effects of an original discriminatory assignment. Application to these individuals of earned company seniority in a rightful place job fits them properly into, rather than abrogates, the existing seniority system, and can hardly be said to threaten the vitality of seniority systems generally. Congress has endorsed the prevailing interpretation of the courts of appeals that Section 703(h) does not insulate applications of a seniority system which prevent victims of discrimination from using their earned company seniority when they transfer to their rightful place position.

C. Adequate relief for victims of racial discrimination in employment may require a remedy slotting the victims into the seniority positions that would have been theirs absent discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 776–777. Identifying the individual victims of discrimination entitled to claim this seniority relief presents a difficult practical problem, the answer to which will turn on whether the claim and findings involve individual or class discrimination, the reasonable inferences that can be drawn from the factual record, and the nature of the unlawful practices followed by defendants.

In a case where a pattern and practice of discrimination has been demonstrated, this Court has already held that the burden shifts to the defendants to prove that members of the injured class were not victims. *Franks, supra,* 424 U.S. at 772. By contrast, the district court below placed the burden of proving that members of the class were victims on the members of the class themselves (or, here, the government suing on their behalf) and based the allocation of remedies on the strength of the efforts made on behalf of each of them. The court of appeals properly reversed, and reset the order and allocation of proof in a manner which anticipated *Franks*. Petitioners' argument that district court discretion should be sustained in the face of a failure to apply the proper legal principles regarding the allocation of the burden of proof is wrong under both *Franks* and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416.

D. The court of appeals also correctly held that, in the particular factual circumstances of this case, individuals seeking relief as victims of discrimination need not show that they had unsuccessfully applied for a vacant line driver position. The repetitious and continuing quality of a pattern and practice of discrimination has the practical effect of discouraging both initial and follow-up applications. Here the class of affected individuals are incumbents, and it is especially likely that they both knew of, and responded to, the pattern of segregated jobs; indeed there is evidence in the record here to that effect. To require minority employees to have applied for transfer to a segregated job in order to qualify for relief penalizes them for failing to perform what they knew to be a vain and

useless act. Moreover, the presence in this case of a seniority system with transfer penalties acted as an added deterrent to any application.

The court of appeals' remedy does not constitute a preference for all minority employees. The only members of the class entitled to seniority relief are those incumbent minority employees who were qualified when discrimination occurred and when vacancies were available, and whose present desire to transfer suggests that a similar opportunity to transfer in the past would have been accepted.

E. The court of appeals correctly held that the rights of members of the affected class to compete for future vacancies at their home terminals or elsewhere should not be subordinated to the rights of employees transferring from other terminals or to the rights of employees with less seniority who are on layoff. This temporary modification of applicable seniority rules with respect to victims of discrimination who opt to accept the class relief constitutes a limited and practical device to provide a reasonable expectation of obtaining a rightful place vacancy without undue delay. The court of appeals drew upon its frequent experience with discrimination remedies in the context of the trucking industry and correctly concluded that this temporary modification of seniority rules would, with fairness, increase the possibility that the effective relief which Title VII mandates would be achieved. Petitioners charge that non-minority employees may be adversely affected, but the impact is not severe and represents a reasonable application of the principle that "a sharing of the burden of the past discrimination is presumptively necessary." *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 777.

ARGUMENT

I

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY FOUND, ON THE BASIS OF STATISTICAL EVIDENCE AND EXTENSIVE PRE-TRIAL AND TRIAL TESTIMONY CONCERNING INDIVIDUAL ACTS OF DISCRIMINATION, THAT T.I.M.E.–D.C. HAD ENGAGED IN A PATTERN OF DISCRIMINATORY EMPLOYMENT PRACTICES AGAINST BLACKS AND SPANISH-SURNAMED AMERICANS IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A "seasoned and wise" rule of this Court is that, in the absence of an "exceptional showing of error," the concurrent factual findings of two lower courts will be considered final. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214. The presence of statistical as well as testimonial evidence in the decision-making record hardly provides a reason to diverge from that prudential rule. The use of statistics in proving racial discrimination is long established in this Court (*Norris* v. *Alabama,* 294 U.S. 587), and frequent usage in the court of appeals [29] has demon-

[29] *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (C.A. 10), certiorari denied, 401 U.S. 954. See cases cited at A.P. 23, n. 27. The Company suggests that the Sixth Circuit has taken a different view of statistical evidence in *Senter* v. *General Motors Corp.*, 532 F.2d 511, 527 (Br., p. 14, n. 28). While the *Senter* court did state that the statistics there were "not conclusive," it also pointed out that the Sixth Circuit "generally acknowledge[s] the value of statistical evidence in establishing a prima facie case of discrimination under Title VII." 532 F.2d at 527.

strated their utility in Title VII litigation. Statistical evidence, indicative of a recurring quality in the acts charged, is especially pertinent in a pattern and practice suit in which the court must determine whether a company has regularly engaged in discriminatory acts.[30] By challenging the significance of statistical comparisons and the adequacy of the data base, in light of the alleged implications of various disqualifying factors (T.I.M.E.–D.C. Br., p. 14–25), T.I.M.E.–D.C.[31] seeks to involve this Court in the fact-finders' function of evaluating the adequacy of evidence and drawing appropriate and reasonable inferences. Moreover, the testimonial and statistical evidence here was tellingly probative, and indeed compelled the finding of a Title VII violation. These essentially factual conclusions unanimously reached by the judges below should not be disturbed.

The courts below correctly held that the largely undisputed statistical and anecdotal evidence established a *prima facie* case of discrimination. With one exception, no black was ever employed on a regular basis as a line driver by T.I.M.E.–D.C. or any of its predecessors until 1969.[32] As late as March 1971, almost

[30] The legislative history of Section 707 indicates that a "pattern or practice" suit is appropriate when a company has regularly engaged in prohibited acts. See, *e.g.*, 110 Cong. Rec. 14270 (1964) (remarks of Senator Humphrey). In *Washington* v. *Davis*, No. 74–1492, decided June 7, 1976, this Court described the rigorous standard of review that follows from an appropriate statistical showing in a Title VII case.

[31] Notably only petitioner T.I.M.E.–D.C. questions the sufficiency of the evidence.

[32] One black employed as a line driver at the Chicago terminal from 1950 to 1959 (A.P. 20).

three years after the original Nashville suit had been initiated, and five years after the effective date of Title VII, there were only 8 (0.4%) blacks and 5 (0.3%) Spanish-surnamed Americans working in the pool of 1,828 line drivers employed by T.I.M.E.–D.C. At the same time, the great majority of black (83%) and Spanish-surnamed American (78%) employees were assigned to city operation and serviceman jobs, while only 39 percent of other employees held jobs in those categories.[33] Indeed, in 1971, when less than one percent of the line driver jobs were filled by blacks and Spanish-surnamed Americans,[34] several terminals

[33] See pp. 8–9, *supra*. While the most pervasive discrimination found was in keeping blacks and Spanish-surnamed Americans out of line driver jobs, at some terminals they have also been excluded from less desirable jobs. The district court found, for example, that black employees at the Nashville terminal were denied training to become mechanics, partsmen, or shop supervisors (A.P. 61). See also p. 10, *supra*.

[34] T.I.M.E.–D.C. appears to attack the district court's finding (A.P. 59), affirmed by the court of appeals, that line driver, which pays as much as $1,300 to $5,500 more per year than city driver and does not involve loading and unloading trucks, is a more desirable job than city driver (T.I.M.E.–D.C. Br., p. 19). The record amply supports the court's finding (see A. 898, 339–340). While the Company introduced exhibits indicating that, in 1971, city drivers at two terminals averaged more pay than line drivers (Defs' Exs. MMM, PPP, A. 986, 987, 635–636), there is no such evidence respecting any other terminals. Moreover, the Company's exhibits also show that systemwide, in 1971, line drivers earned more than city drivers (line one of Defs' Exs. MMM, PPP, A. 986, 987). Further, Charles F. Hutchinson, T.I.M.E.–D.C.'s Personnel Manager, testified that studies done by the Company which compared the earnings of line drivers and city drivers for the years 1969 and 1970, in which the earnings of those drivers making less than $3,000 were excluded, disclosed no instances where line drivers earned less than city drivers (A. 626). In any event, the discrimi-

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located in areas with a large percentage of blacks in the population still had no black line drivers.[35] It is clear that blacks and Spanish-surnamed Americans were available, because they were employed by the company in less desirable jobs, including city driver jobs requiring qualifications similar to those of line drivers. In 1971, blacks and Spanish-surnamed Americans constituted 15% of the employees in city operation jobs for T.I.M.E.–D.C.[36] In these circumstances, the *prima facie* inference that the exclusion of qualified blacks and Spanish-surnamed Americans from more desirable jobs was a result of invidious discrimination is compelling. As Mr. Justice Frankfurter observed more than twenty years ago: "The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity." *Avery* v. *Georgia,* 345 U.S. 559, 564 (concurring opinion).

Petitioner offered no explanation for the great statistical disparity in the employment of black and Spanish-surnamed Americans in line driver jobs and their employment in city driver and less desirable

natory exclusion of a protected class from any job category would violate Section 703(a)(2). See, *e.g., United States* v. *Hayes International Corp.*, 456 F.2d 112, 118 (C.A. 5).

[35] Compare line driver statistics for Atlanta, Dallas, Los Angeles, and Memphis terminals (A.P. 70–72) with population statistics for those areas (A.P. 68–69); see also A.P. 25, n. 29. According to 1970 Census data, blacks comprise 13.4% of all "truck drivers." U.S. Bureau of Census, Census of Population, 1970. Characteristics of Population, Vol. I, Part 1, P. 1–392, Table 91: "Occupation of Employed Persons by Race, for Urban and Rural Residence."

[36] See p. 9, *supra.*

jobs, other than the general statement that it hired the best qualified applicants (T.I.M.E.–D.C. Br., p. 21). *Cf. Norris* v. *Alabama, supra,* 294 U.S. at 598; *Hernandez* v. *Texas,* 347 U.S. 475, 480–481. There was no evidence that the exclusion of minority employees from line driver jobs was due to any valid job requirement;[37] the only significant requirement for a line driver position was experience driving tractor-trailer equipment,[38] experience which many of the city drivers either had when they applied for a job at T.I.M.E.–D.C. (A. 325–327, 370), or acquired as a result of city driving.[39] Even where it was asserted that there was a minimum driving requirement, that requirement was not applied uniformly, and there is evidence that it was waived for white applicants.[40] Both courts below suggested that unexplained statistical disparities of the magnitude present in this case (A.P. 18–22) can shift the burden of proof. On this point, the court of appeals specifically referred to its prior ruling in *Rowe* v. *General Motors Corp.,* 457 F. 2d 348, 358 (C.A. 5), that "figures of this kind while not necessarily satisfying the whole case, have critical, if not decisive, significance—certainly, at least in putting on

[37] Had such a requirement been asserted as the reason for disparate job assignment statistics, petitioner T.I.M.E.–D.C. would have been required to show that the requirement was supported by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432. No such evidence was adduced.

[38] See, *e.g.*, deps. of Ned M. Rockwell, May 17, 1971, at 7–8; Kenneth N. Gibbs, Jr., pp. 27, 70–72; D. N. Champlin, pp. 15, 18, 64; Robert C. Cathey, pp. 22–23; and p. 8, *supra.*

[39] A. 325–327, 370–71.

[40] See, *e.g.*, deps. of Kenneth N. Gibbs, Jr., pp. 27, 70–72; Don Capshaw, pp. 294–295.

the employer the operational burden of demonstrating why, on acceptable reasons, the apparent disparity is not the real one" (A.P. 23). That statement is correct.

While the use of statistics to shift the evidentiary burden is most familiar to this Court in jury selection cases (see, *e.g., Norris* v. *Alabama, supra; Hernandez* v. *Texas,* 347 U.S. 475; *Turner* v. *Fouche,* 396 U.S. 346),[41] the burden-shifting inference is equally appropriate in a Title VII pattern of discrimination suit which similarly requires more than isolated rejections of qualified individuals. As in a jury selection case, statistical disparities of sufficient magnitude may show that a pattern exists and, in the absence of satisfactory explanation, compel the common sense conclusion that the disparities are not fortuitous.

The intensity of the statistical showing here vitiates petitioner's quibbles with the precision of the government's statistics. In the face of a showing that less than one percent of petitioner's 1,800 line driver positions were filled by minority employees, the courts below were entitled to reject the attempts of petitioner's witnesses to undermine the impact of the statistics. As the court of appeals stated, "the inability to rebut came not from lack of an informed standard. Rather, in most instances for LDs [line driver], the inability came from the inexorable zero" (A.P. 25).

Indeed, most of petitioner's statistical points are deficient on their face. For example, petitioner challenges the use of the S.M.S.A. as a basis of compari-

[41] The disproportions in the present case greatly exceed that found in *Turner, supra,* 396 U.S. at 359 (37% blacks on a grand jury as compared to 60% of the total population) to warrant corrective action by the courts.

son of minorities employed to minorities available in the community (T.I.M.E.-D.C. Br., p. 18); however, the order under review here provided class relief only for incumbent employees and relied principally on the statistical disparity between employment of incumbent whites and employment of incumbent blacks and Spanish-surnamed Americans in more desirable jobs (A.P. 18–22). Petitioner does not even address the evidence of statistical disparity in the concentration of these minority employees in the less desirable jobs. Similarly, petitioner cites statistics indicating hiring practice improvements in 1971 (T.I.M.E.-D.C. Br., p. 18), but the violations found occurred prior to 1971 and the relief afforded was limited to the pre-1971 period (A.P. 12, 29–30, n. 33). Moreover, petitioner's overall work force statistics do not indicate the jobs to which minority employees were assigned, a pivotal point in this litigation.

Thus, this is not a case where "fine tuning" of statistics to reflect those portions of the minority community suited by age and health to a job (T.I.M.E.-D.C. Br., pp. 19–20) would have any effect on the outcome. Where, as here, the job requirements were relatively minimal, the incumbent statistics egregious, and the testimonial evidence compelling, no useful purpose would be served by a requirement (involving substantial costs) to develop more precisely the statistics comparing minority hiring to minority availability in the area.[42] To prohibit the use, for *prima facie* pur-

[42] Petitioner attacks the use of Standard Metropolitan Statistical Area and Urban Place statistics (Br., p. 18 and n. 39). City statistics were also introduced (see A.P. 68–69). If the avail-

poses, of obviously helpful and reliable, available statistics because more sophisticated statistics could be created would be counterproductive to Title VII goals, without advancing the cause of judicious resolution of Title VII disputes.

The use of statistics by the courts below to draw simple, *prima facie* evidentiary inferences is not, as petitioner argues, an attempt to impose a racial balance standard for violations of Title VII; nor is it an attempt to force "preferential treatment" of minorities as a requirement of law in derogation of Section 703(j) (T.I.M.E.–D.C. Br., pp. 14–16). The evidentiary inferences that arise from the statistics are based, not upon failure to achieve racial balance, but rather upon "flagrant statistical deviations" (A.P. 23) from employment patterns which presumably would reflect an unbiased hiring process. Such evidentiary showings are clearly within the contemplation of the statute. Here, where the employer charged with discrimination has more than 6,000 employees located at 51 terminals in 26 states, and the class of alleged dis-

ability of prospective minority employees is to be determined by any other geographical standard, petitioner has not indicated what it might be.

Citing the testimony of one of its trial witnesses, a professor of psychology, T.I.M.E.–D.C. asserts that he demonstrated respondent's statistics to be unreliable to predict the availability of blacks and Spanish-surnamed Americans to join the workforce at the respective terminals (Br., pp. 19–20). Neither of the courts below found this witness's testimony adequate to undermine respondent's proof. Moreover, the witness acknowledged that the only information available respecting black and Spanish-surnamed American population was that utilized by the government (A. 564).

criminatees numbers more than 300, the use of statistics is essential in establishing a pattern and practice of discrimination. Far from reflecting a standard of racial preference which Section 703(j) prohibits, the use of these statistics is in an effort to determine whether the employer utilized legitimate and objective considerations in hiring in accordance with the Title VII standard."[43] That Section 703(j) is not intended to preclude such evidentiary showings is made clear in the legislative history of the 1972 Amendments to the Act, which indicates that Congress both knew and approved of court reliance on statistical evidence to draw inferences and, in appropriate cases, to shift the burden of proof."[44]

While the statistical evidence of gross disparities in the allocation of line driver jobs to minority and non-minority employees could alone have supported a

[43] See remarks of Senator Humphrey, 110 Cong. Rec. 12723 (1964) (A. 190); remarks of Congressman Celler, 110 Cong. Rec. 1518 (1964) (A. 189).

[44] Congress, in passing the 1972 Amendments to Title VII, was fully aware that the appellate courts were using severe statistical disparities as a basis for shifting the burden of proof. An amendment was introduced by Senator Ervin which would have amended Section 703(j) to bar use by any federal agency or federal court of quotas, goals or other numerical ratios. Senator Ervin argued that Section 703(j) was being misconstrued to permit use of numerical ratios. The floor managers of the bill, Senators Williams and Javits, cited and relied *inter alia* upon *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), and reprinted that opinion in full in the Congressional Record, 118 Cong. Rec. 1665, 1671–1675 (1972). That opinion contains a classic statement of the courts' reliance on statistical evidence to draw inferences and to shift the burden of proof, 443 F.2d at 551; 118 Cong. Rec. 1673, 1675 (1972). The Senate accepted the Williams/Javits position and voted to reject Senator Ervin's amendment by a vote of 22–44 (118 Cong. Rec. 1676 (1972).

prima facie case, the statistical showing was also matched by compelling testimonial evidence.[45] Numerous experienced and qualified black and Spanish-surnamed drivers who applied for line driver positions, or who asked to transfer to such positions, had their requests ignored, or otherwise were denied the opportunity, after being given false information.[46] Moreover, there was substantial evidence that the practice of denying those minorities such positions was motivated by considerations of race and national origin.[47]

While both courts below noted that statistics may establish a *prima facie* case, both went on to consider the testimonial evidence and *neither* based its conclu-

[45] Petitioner T.I.M.E.-D.C. also attacks the testimonial evidence as involving incidents "too isolated in number and in time to serve as a basis for a finding of a systemwide pattern or practice of discrimination" (Br., p. 20). Testimony was taken from approximately ten percent of the members of the class for whom relief was sought. As the court of appeals noted: "The [ten] terminals at which the Government took depositions are spread throughout the entire T.I.M.E.-D.C. system", and contain seven of the ten largest line driver operations, domiciling 1,171 line drivers (A.P. 26 and n. 30).

Petitioner's reference to the period of time over which the incidents occurred appears to be intended as an attack upon the relevance of discriminatory acts occurring prior to the effective date of Title VII. Evidence of such pre-Act discrimination is relevant in two ways. First, it is evidence that there was a long-standing practice which may have continued past the Act's effective date. Second, since part of respondent's case charges that the seniority system perpetuates the effects of past discrimination, evidence of pre-Act discrimination lays part of the ground work for that claim.

[46] See pp. 9–10, *supra*.

[47] See pp. 9–11, *supra*.

sion that a pattern of discrimination had been established on the statistics alone (A.P. 60–61, 23–24; compare T.I.M.E.-D.C. Br., pp. 14–25). Thus, the court of appeals observed (A.P. 26) that there was evidence of more than 40 specific instances of discrimination throughout the system of T.I.M.E.-D.C.—instances often egregious and viewed as a whole quite definitely supporting the finding that a pattern and practice of discrimination occurred.

This confirmed the district court's findings (A.P. 60–61) that:

> (a) Numerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.
>
> (b) Numerous qualified black and Spanish-surnamed American employees who have sought transfer to line driving jobs at the company have either been denied the opportunity to do so, or have not been permitted to transfer on the same basis as whites.

Because of the strong evidence of individual instances of discrimination,[48] the inferences that would ordi-

[48] Examples of race and national origin motivation include:

(a). R. D. Parker, a black city driver at the Memphis terminal. When Parker was first hired in 1949, he was told by the terminal manager that "he didn't have any colored road drivers" but that Parker could work in the city. In 1956, when white city drivers at the terminal were allowed to drive extra road runs and Parker also requested them, Parker was in-

narily arise from the statistical evidence gain added force. It was on the basis of "[a]ll of the evidence" (A.P. 61), including that presented by petitioners in attempted rebuttal, that both courts below concluded that petitioners had engaged in a pattern of discrimination against blacks and Spanish-surnamed Americans (A.P. 60–61).

Thus the issue petitioner attempts to raise (T.I.M.E.-D.C. Br., p. 14), whether, in the absence of testimonial evidence, statistics alone could be "dispositive", simply does not arise in this case. Rather this case presents the typical situation, where the court utilizes a combination of statistical and testimonial evidence to reach a reasoned conclusion regarding pattern and practice. Indeed, findings of discrimination against minorities in opportunities for line driver positions have been made and upheld based on similar testi-

formed by the terminal manager that the general office "was not going to let no colored drive the rigs up and down the highway." (Summary of dep. of R. D. Parker, pp. 1–2. in Pl's Ex. 240 (A. 277–278).)

(b). Feliberto Trujillo, a Spanish-surnamed American dockman (checker) at the Denver terminal. When Trujillo applied for a line driver job in 1967, he was told by a terminal personnel officer that he had one strike against him. Trujillo asked what that was and was informed: "You're a Chicano, and as far as we know, there isn't a Chicano driver in the system." (Dep. of Feliberto Trujillo, pp. 6–7.)

(c). Thomas W. White, a black city driver at the Los Angeles terminal. After White filed a complaint with the State of California in 1961 over his inability to get a line driver job at the Company, he was assigned exclusively to the task of unloading blocks of rubber, a heavy, dusty and dirty job, for an eight to ten month period, although it was normal practice for the dispatcher to rotate such undesirable assignments among all the city drivers (A. 333–335).

monial and statistical showings in numerous appellate and district court decisions concerning the trucking industry.[49]

The carefully based findings below are not deficient because the courts rejected in this context the standards of proof which may be typical in an individual action for discrimination. In *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792, this Court considered the "order and allocation of proof in a private, non-class action challenging employment discrimination" (411 U.S. at 800). The Court held that an individual claiming that his application for reemployment was rejected because of his race must show as part of his *prima facie* case not only that discrimination apparently occurred, but also that he was a victim of the alleged discrimination—including proof that a vacancy existed for which he was qualified and from which he was excluded.[50] Only then would the burden shift to the employer to show a legitimate non-discriminatory reason for the employee's rejection.[51]

[49] An extensive list of cases is collected in Teamsters Pet. 16, n. 26.

[50] The Court stated (411 U.S. at 802): "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

[51] The Court, however, pointed out (411 U.S. at 802, n. 13): "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."

As this Court held in *Franks* v. *Bowman Transportation Co., supra,* the order and allocation of proof are substantially different in a case alleging a pattern and practice of discrimination against a class of individuals. In a class action suit (or its counterpart in litigation by the government—a pattern and practice suit) the liability and remedy stages are typically split. The purpose of testimony at the liability stage is not to show that any particular individual would have obtained a specific job but for discrimination, but rather to support the inference of a pattern and practice of discrimination created by statistical evidence. Consequently, not all individuals discriminated against need testify at the liability stage. As the court of appeals stated, "[i]t would be contrary to a claim of this structure to have to offer testimony concerning every member of the affected class" (A.P. 34).[52] Since the issue of whether a particular individual has a valid claim to relief is left to determination during

[52] Petitioner T.I.M.E.-D.C. appears to argue that the failure to apply the *McDonnell-Douglas* standard deprived it of an opportunity to rebut the testimonial evidence (Br., p. 22–25). That contention is without foundation. Petitioner cross-examined respondents' witnesses and put on witnesses of its own. Despite this opportunity, the district court found that there were numerous instances of discrimination by the Company against blacks and Spanish-surnamed Americans.

The district court further held that a case of individual discrimination had been made out with respect to thirty of the witnesses and that, as a result, they were entitled to relief (A.P. 73–76). Those findings demonstrate the weight of the testimonial evidence. While the court of appeals ruled that such a determination was not necessary at the liability stage of a pattern and practice suit, it upheld the district court's findings (A.P. 33–34, 38).

the remedy stage, the pattern and practice finding cannot be challenged now on the basis that petitioner has not yet had the opportunity to demonstrate that individual class members were not victims of discrimination. In *Franks,* the district court had denied seniority relief because of a lack of evidence regarding vacancies and qualifications of individual class members and its "concern that some of the unnamed class members * * * may not in fact have been actual victims of racial discrimination." 424 U.S. at 772. This Court ruled that seniority relief should be afforded to the class and that evidence as to individual injury would become material to defendant's burden at the remedy stage when individual members sought to avail themselves of class relief. Thus the court of appeals here merely anticipated *Franks* in holding that "[w]hatever evidentiary hearings are required for individuals can well be postponed to the remedy" (A.P. 34).

Petitioners had the opportunity to introduce all their evidence as to the pattern and practice violation in the district court. They argued the significance of that evidence in that court and again in the court of appeals. Both courts found the evidence of a violation to be overwhelming. Finally, petitioners will have their opportunity in accordance with *Franks* to rebut the *prima facie* case as to individual claimants when class members seek their remedy. There is, accordingly, nothing in this case warranting this Court's reexamination of the concurrent findings of the two courts below.

II.

A SENIORITY SYSTEM THAT PENALIZES INCUMBENT EMPLOYEES WHO TRANSFER TO HIGHER PAYING, MORE ATTRACTIVE, TRADITIONALLY WHITE JOB CLASSIFICATIONS FROM WHICH THEY PREVIOUSLY WERE EXCLUDED PERPETUATES THE EFFECTS OF A PATTERN AND PRACTICE OF RACIAL DISCRIMINATION AND VIOLATES TITLE VII

A. A SENIORITY SYSTEM WHICH REQUIRES VICTIMS OF RACIAL DISCRIMINATION TO FORFEIT THEIR ACCRUED COMPETITIVE STATUS SENIORITY IN ORDER TO TRANSFER TO A JOB PREVIOUSLY SEGREGATED ON THE BASIS OF RACE, PERPETUATES THE EFFECTS OF PRIOR DISCRIMINATION

It is the policy and practice of T.I.M.E.–D.C., pursuant to its agreements with the Teamsters, that an employee who moves between jobs covered by separate collective bargaining agreements forfeits his seniority for all purposes except fringe benefits (A. 48, #15). The job of line driver, from which incumbent blacks and Spanish-surnamed Americans have been excluded, is covered by collective bargaining agreements separate from those which govern the less desirable jobs to which these minority employees were assigned. The Teamsters argue that the system evolved without racial intent (Br., pp. 19–33). Nevertheless, in order to claim a line driver opportunity that has been denied because of race, minority employees must be willing to forego the seniority that is already theirs because of service to the Company. Thus, the application of the challenged seniority system to classes of T.I.M.E.–D.C. employees previously discriminatorily

excluded from line driver jobs perpetuates the effects of past discrimination.

The practical penalties attached to transfer by this policy operate to perpetuate the exclusion of incumbent minority employees from the position of line driver by requiring them to give up earned bidding rights and protection against layoff. Preservation of seniority may be essential to an employee's economic survival; if employment decreases, he may find himself jobless. Thus, the loss of seniority becomes almost an absolute impediment to transfer. Even if he transfers, he will never catch up to the level of his contemporary who was not subject to discrimination. He is locked into a less desirable job, in terms of working conditions and pay, than that obtained by his nonminority counterpart, who was hired at the same time. The city or shop employee who transfers to a line driver position is treated as the junior-most person on the line driver list and placed forever behind his nonminority contemporaries or juniors in company service. For example, a black employee who was qualified to be a line driver in 1958, but because of discrimination was not given an opportunity to transfer to such a job until 1971, is placed in a competitive position junior to that of a white hired in 1970. Under the seniority system, he continues to suffer the effects of discrimination, even after transfer, by being denied credit for the seniority he acquired while working in the only job he was able to obtain. By conditioning present and future advancement in line driver jobs on the basis of a qualification—line driver seniority—which blacks and Spanish-surnamed Americans have

been precluded from obtaining, this aspect of the seniority system transforms past discrimination into present and future discrimination. As the Fifth Circuit noted in a case involving facts similar to those here:

> Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. [*Local 189, United Papermakers* v. *United States,* 416 F.2d 980, 988, certiorari denied, 397 U.S. 919.]

By ensuring that the "compensation, terms, conditions, or privileges of employment" will continue to be distributed on the basis of a prior racial classification, application of the seniority system to incumbent employees who are the victims of prior discrimination violates the explicit language of Section 703(a)(1) of Title VII.

Both before and after *Griggs,* every court of appeals confronting the issue has held that a "job" or department seniority system is itself a violation of Title VII insofar as it applies to an affected class of incumbent minority employees who were assigned to less desirable positions at a time when race or national origin precluded their consideration for better paying traditionally white jobs.[53] Similarly, each of the appellate courts that has considered this issue has ruled that the

[53] See, *e.g., Local 189, United Papermakers* v. *United States,* 416 F.2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Navajo Freight Lines, Inc.,* 525 F.2d 1318 (C.A. 9); *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (C.A. 7); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870 (C.A. 6); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354 (C.A. 8).

seniority system in the trucking industry perpetuates traditional practices of excluding minorities from line (or road) driver positions and, therefore, is unlawful as applied to those minority employees assigned to non-line jobs during the period of discrimination. *Hairston* v. *McLean Trucking Co.,* 520 F.2d 226 (C.A. 4); *Sabala* v. *Western Gillette, Inc.,* 516 F.2d 1251 (C.A. 5), petitions for certiorari pending, Nos. 75–781, 75–788; *Thornton* v. *East Texas Motor Freight,* 497 F.2d 416 (C.A. 6); *United States* v. *Navajo Freight Lines, Inc.,* 525 F.2d 1318 (C.A. 9). The court of appeals below was correct in holding application of the seniority system to affected class members violative of Title VII once it found that "the minority employees were locked-in to the positions where they were initially discriminatorily assigned" (A.P. 24).

The Teamsters raise two "equitable" arguments challenging the finding that the seniority system that they negotiated violates Title VII. First they argue that since the Teamsters have no intent to discriminate, the fact that the seniority system perpetuates discrimination should not constitute a violation of the Act. However, as this Court stated in *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432, Congress directed the Act at the consequences of employment practices and "good intent * * * does not redeem employment procedures * * * that operate as 'built-in headwinds' for minority groups." Since the challenged application of the seniority system to which the union is a party continues the effects of past discrimination on members of the affected class and the union has

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taken no steps to correct the practice, they have intentionally engaged in an unlawful employment practice within the meaning of Title VII.[54]

The Teamsters' second argument is that there is no need for the courts to order any relief with respect to the seniority system, since the contract grievance procedure is theoretically available for victims of discrimination to use in obtaining their rights. However, as this Court made clear in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, even where contract rights closely approximate statutory rights, a private collectively controlled grievance procedure cannot serve as a replacement for court enforcement of the individual rights that Congress has established in Title VII. *A fortiori,* here, where the collective agreement to be enforced in the grievance procedure is itself the source of the challenged discriminatory practice, that procedure could hardly serve as a substitute for the statutory remedy.

B. SECTION 703(h) DOES NOT SAFEGUARD APPLICATIONS OF A SENIORITY SYSTEM WHICH DISCRIMINATE BETWEEN INCUMBENT WORKERS ON THE BASIS OF PRIOR DISCRIMINATORY JOB CATEGORY ASSIGNMENTS

Section 703(h) of Title VII makes lawful differing conditions of employment "pursuant to a bona fide

[54] "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430; *Local 189, United Papermakers* v. *United States*, *supra*, 416 F.2d at 996–997; *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 796; *United States* v. *Central Motor Lines, Inc.*, 338 F. Supp. 532, 559 (W.D. N.C.); *Cathey* v. *Johnson Motor Lines, Inc.*, 398 F. Supp. 1107, 1116 (W.D. N.C.).

seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race * * *." Since the purpose of Title VII is to eliminate all discriminatory employment practices in whatever form which create inequity through the mechanism of employment discrimination (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44), Section 703(h) must be properly limited to accomplish its purposes without frustrating the pervasive remedial goals of the statutory scheme. Last Term in *Franks* v. *Bowman Transportation Co., supra*, this Court refused to hold, in the absence of explicit language or a compelling legislative history, that Section 703(h) qualified or proscribed relief otherwise appropriate under the remedial provisions of Title VII, "once an illegal discriminatory practice occurring after the effective date of the Act is proved." 424 U.S. at 762. Instead, the Court held that Section 703(h) is fully consistent with the awarding of relief designed to restore victims of employment discrimination to their rightful place in the seniority system and, indeed, that under the Act "rightful-place seniority, implicating an employee's *future* earnings, job security, and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal." 424 U.S. at 764–765 n. 21 (emphasis in original); see also 424 U.S. at 767–768 and n. 28. As that holding indicates, neither the language of the statute nor its legislative history requires, or even suggests, that Section 703(h) should be read as protecting those applications of a seniority scheme which maintain discriminatorily segregated categories of incumbent

employees and sustain conditions of employment which result solely and directly from intentional racial discrimination.

The cloudy legislative history of Section 703(h), which is set out in *Franks* and will not be fully repeated here, does little in itself to illuminate the precise range of the protection provided by it.[55] The purpose of the section, to the extent that it can be gleaned from the legislative history, was to protect the seniority system as a governing principle in labor-management relations and to preserve the seniority credit concepts of employee advancement from complete overhaul as a result of passage of Title VII.[56] A requirement of preferential treatment based upon a history of pre-Act discrimination, it was feared, would mandate the immediate hiring of minority persons and the awarding of preferences for blacks solely on account of their race.[57] In order to allay such fears,

[55] It should be recalled that most of the debate preceded the introduction of the substitute bill containing Section 703(h).

[56] While there were some general statements that seniority rights would not be affected, the discussions there were concerned with the situation in which an employer had excluded blacks altogether from its work force, and with protecting previously accrued layoff rights of "white workers who were hired earlier" against later hired blacks.

Thus, the Clark-Case Interpretive Memorandum stated "if a business has been discriminating in the past and as a result has an all-white working force", the employer "would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes", or "once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964), quoted in full in *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 759, n. 15. See, also, n. 62, *infra*.

[57] See remarks of Senator Hill, 110 Cong. Rec. 468–488 (1964).

the Act's supporters pointed out that it would not require preferential treatment, such as the discharge of whites in favor of minorities or the award of fictional seniority to newly hired minority employees.[58]

As the holding in *Franks* suggests, nothing in this history indicates that Section 703(h) was intended to protect those applications of a seniority system which would perpetuate the effects on incumbent employees of prior discriminatory job assignments; and the courts have unanimously held that Section 703(h) does not do so.[59] The purpose expressed in the legislative history of protecting the seniority system as a governing principle is fully consistent with conferring their rightful place within a seniority system on incumbent minority employees who would otherwise be locked-in to less desirable jobs by an application of the seniority system which perpetuates the effects of an original discriminatory assignment.[60]

[58] It was in this context that they stated that it would operate prospectively and would protect existing seniority lists. See questions and answers to questions propounded by Senator Dirksen, quoted in *Franks*, *supra*, 424 U.S. at 760–761, n. 16; Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1271 (1967).

[59] *United States* v. *Chesapeake* and *Ohio Ry. Co.*, 471 F.2d 582, 587–588 (C.A. 4); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 453 (C.A. 5), certiorari denied, 406 U.S. 906; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 661–662 (C.A. 2), *Local 189, United Papermakers* v. *United States*, *supra*, 416 F.2d at 987–988, 994–995; *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 515–517 (E.D. Va.).

[60] The discussion in the legislative history of Section 703(h) was not directed at segregated work forces or the effect of denying to blacks who had been excluded from consideration for the more desirable, higher paying jobs because of their race the right to use their accumulated seniority or any portion

Where seniority has been earned, albeit in a less desirable job category, application of that seniority (within the existing seniority system) in another, more desirable job category, for an individual qualified to fill the more desirable job, neither abrogates the existing seniority system nor threatens the continued vitality of seniority systems generally. Note, *supra,* 80 Harv. L. Rev. at 1271. See, *Local 189, United Papermakers* v. *United States, supra,* 416 F.2d at 995. Rather than making seniority illegal, Title VII enforcement merely means that earned seniority will be protected within the established seniority system when the victims of discrimination take their rightful place in job categories from which they previously were excluded.

Indeed, seniority systems which perpetuate categories of employment which were filled on a racially discriminatory basis fall within the express proviso to Section 703(h) excluding from that section's protection "differences" in conditions of employment that are "the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *." Where the minority employee was hired into a system embodying discriminatorily segregated lines of progression, job categories, or departments and accrues years of seniority, the continued application of separate seniority systems to him is at the crux of his discrimination injury because it perpetuates the effects of

thereof as the basis for competing in those jobs. Note, *supra,* 80 Harv. L. Rev. at 1271; Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications,* 47 Tex. L. Rev. 1039, 1042 (1969); Note, *Civil Rights—Racially Discriminatory Employment Practices Under Title VII,* 46 N.C.L. Rev. 891, 895 (1968).

the intentionally discriminatory job assignment pattern.

As to such employees, the separate conditions of employment caused by the seniority system are unprotected by Section 703(h) because they "are the result of an intention to discriminate because of race." [61] Indeed, it would be anomalous for Title VII to prohibit the exclusion of minorities from certain job categories and then insulate the seniority mechanism which implements and gives continuing effect to prior intentional discrimination involving precisely that exclusion.

Indeed, as the court below held, the rightful-place rationale subsequently adopted by this Court in *Franks,* although applied in that case only to providing a seniority remedy for employment discrimination which occurred after the effective date of Title VII, applies as well to the post-Act application of seniority mechanisms to deny to the victims of discrimination their full earned seniority (post-Act and pre-Act, from the time they were—or absent discrimination would have been—qualified for the job) in the job from which they previously were discriminatorily excluded.[62] In the present case, not only does

[61] "The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended." *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505, 518 (E.D. Va.). See Cooper and Sobol, *Seniority And Testing Under Fair Employment Laws: A General Approach To Objective Criteria Of Hiring And Promotion,* 82 Harv. L. Rev. 1598, 1613 (1969).

[62] Smilarly, the Interpretive Memorandum introduced into the Congressional Record by Senators Clark and Case in re-

the post-Act application of the seniority system to perpetuate discrimination, itself constitute the requisite statutory violation,[63] but, in addition, the pattern and practice of discriminatory refusal to transfer to be remedied here is a continuing violation which (with respect to some individuals) extends over both a pre-Act and post-Act period.[64]

Finally, as this Court recognized in *Franks* (424 U.S. at 764–765 n. 21), any doubt that Section 703(h) was not intended to protect particular applications of a seniority system of the sort involved in this case was resolved by the legislative history of the amendments to Title VII contained in the Equal Employment Opportunity Act of 1972. That legislative history is replete with references to the lower court cases holding that Section 703(h) did not protect such applications of seniority systems, including *Quarles* v. *Philip Morris, Inc., supra; Local 189, United Paperworkers* v. *United States, supra;* and *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7), *e.g.*, S. Rep. No. 92–

sponse to attacks on the bill's effect on employee hiring and seniority rights, noted that: "[W]here waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination" 110 Cong. Rec. 7213 (1964).

[63] The district court has not yet established the qualification date, if any, for each member of the affected class.

[64] *Local 189, United Papermakers* v. *United States supra*, 416 F. 2d at 995; *Quarles* v. *Philip Morris, Inc., supra*, 279 F. Supp. at 517; Note, *supra*, 80 Harv. L. Rev. at 1270.

415, 92d Cong., 1st Sess. 5, 8 (1971). Congress not only left the substantive provisions of Title VII unchanged, but specifically endorsed the interpretation which had prevailed in the courts:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. [Section-By-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972–Conference Report, 118 Cong. Rec. 7166 (1972)].

Congress' endorsement of court decisions treating applications of seniority systems which perpetuate the effects of prior discrimination on incumbent employees as subject to the prohibitions of Title VII illuminates the meaning of Section 703(h) and is entitled to substantial weight. See *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275; *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 380–381. Especially in light of this congressional reconfirmation of the broad purpose of Title VII to root out "practices that are fair in form, but discriminatory in operation" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431), there is no reason to interpret Section 703(h) so as to deny protection to a generation of incumbent minority workers, who have worked under a discriminatory system.[65]

[65] The seniority cases cited in the legislative history involved perpetuation of discriminatory exclusion from traditionally white jobs by the application of a racially neutral seniority system, rather than discrimination in initial hiring. See *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 764–765 n. 21.

III

THE COURT OF APPEALS CORRECTLY RULED THAT IN A CASE WHERE A PATTERN AND PRACTICE OF DISCRIMINATION BEEN PROVED AN INCUMBENT MINORITY EMPLOYEE SEEKING RIGHTFUL PLACE SENIORITY RELIEF WHO IS A MEMBER OF THE AFFECTED CLASS (1) IS ENTITLED TO A REBUTTABLE PRESUMPTION THAT HE WAS A VICTIM OF DISCRIMINATION, AND (2) NEED NOT NECESSARILY HAVE UNSUCCESSFULLY APPLIED FOR A VACANT, RIGHTFUL PLACE JOB TO BE ENTITLED TO RELIEF

Petitioners do not appear to challenge the principle, established by this Court's decision in *Franks* v. *Bowman Transportation Co., supra,* that rightful-place relief for the victims of discrimination may involve full seniority transfer based on accrued company seniority. Nevertheless, they object to the court of appeals' decision on two grounds. First, they argue that the district court had discretion to award relief based upon the degree of injury demonstrated by evidence introduced in making the pattern and practice case (T.I.M.E.-D.C. Br., pp. 25–27; Teamsters Br., pp. 43–46). Second, they claim that by not applying the *McDonnell Douglas* standards for proof of injury, the court of appeals awarded preferential relief to all minority employees irrespective of injury, in effect creating a racial preference system (T.I.M.E.-D.C. Br., pp. 28–32; Teamsters Br., pp. 47–54). Petitioners are wrong on both counts.

There is no doubt that the fashioning of Title VII remedies ordinarily lies within the discretion of the district court. But that discretion must be governed by sound legal principles and when a district court's lim-

itations on remedy, if applied generally, would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," the district court must be reversed. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421 (footnote omitted). As this Court reiterated in reversing a district court's remedial order in *Franks,* that discretion is vested, not for the purpose of limiting appellate review of trial courts, but "rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case" (424 U.S. at 770–771).

1. The court of appeals correctly rejected the district court's allocation of relief based upon evidence of "degree of injury" submitted during the liability stage of this pattern and practice case. That allocation was inconsistent with Title VII's proper enforcement in two ways. First, it would require the government in proving a pattern and practice case to introduce testimony as to every alleged victim of discrimination in order to make the required showing that individual injury occurred in every instance. That requirement would essentially destroy the class-action nature of a pattern and practice suit and transform it into a mere aggregation of individual claims as to which a pattern and practice finding would have little, or no, significance. As the court of appeals stated, "[i]t would be contrary to a claim of this structure to have to offer testimony concerning every member of the affected class" (A.P. 34). Such a requirement would place an enormous practical burden on the government, and

consume immense judicial time without warrant. "[I]t would defy reason and waste precious judicial resources for the Court either to require or permit individualized proof for every member of a class here numbering nearly 400 but frequently involving thousands" (A.P. 34).

The district court's limitation on relief based on proof of injury at the pattern and practice trial stage was improper for a second and at least equally important reason. The district court placed the burden of identifying who was a victim of discrimination on the wrong party, denying relief where members of the affected class could not provide "clear and convincing" evidence that they were victims of individual discrimination (A.P. 64–65). This is precisely contrary to this Court's subsequent specification in *Franks* of the proper allocation of proof in such a case. There this Court explicitly held that once a pattern and practice case has been made out in a case seeking class relief, the burden shifts to the defendants to prove that the members of the injured class were not victims: "But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination" (424 U.S. at 772).[66] Absent such proof at the remedy stage, here,

[66] See, also, *United States* v. *Bethlehem Steel Corp.*, *supra*, 446 F.2d at 660; *United States* v. *Jacksonville Terminal Co.*, *supra*, 451 F.2d at 453; *United States* v. *Chesapeake and Ohio Ry. Co.*, *supra*, 471 F.2d at 593; *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 310 (C.A. 8), certiorari denied, 409 U.S. 1116; *United States* v. *Central Motor Lines, Inc.*, *supra*, 338 F. Supp. at 560.

as in *Franks,* each member of the affected class is "presumptively entitled" to relief (*ibid.*).

Thus, as the court of appeals implicitly recognized, the restructuring of the case accomplished by awarding full class relief, once plaintiffs demonstrate a pattern and practice of discrimination, involves not simply the question of when proof will be introduced, but by whom the subsequent evidentiary burden will be carried. Contrary to petitioner's contention (T.I.M.E.–D.C. Br., p. 32), they must do more than simply return to the district court to retry the evidence; they must decide whether they possess evidence to rebut the presumption that each member of the affected class is a victim. Thus, the shifting of the evidentiary burden may either substantially limit, or eliminate altogether, the necessity for further proceedings. Only in those instances where petitioners believe they have that rebuttal evidence will an evidentiary hearing be required at the remedy stage.[67]

2. Assuming that the determination of who is to be a recipient of the full class relief is thus to be decided at the remedy stage in accordance with the *Franks* presumption, the petitioners urge that the rule established by the court of appeals will not properly identify the victims of discrimination. Petitioners

[67] The references to the court's opinion cited by petitioner T.I.M.E.–D.C. (Br., p. 25) to support its allegation that the court of appeals has foreclosed such proof relate only to the inappropriateness of introducing such evidence at the liability stage and of limiting seniority relief to those who have carried the burden of proving that they have suffered discrimination (A.P. 34, 39).

appear to believe that *McDonnell Douglas* and *Franks* established standards for identifying the victims of discrimination in all Title VII cases which, if abandoned, would allow every minority employee to obtain a "preference" regardless of actual injury.

In *McDonnell Douglas* a minority individual, who claimed that his job application was rejected for racial reasons, was required to prove that he applied, that he was qualified, and that other applicants were sought for the vacancy after he was rejected. The Court carefully noted that it was addressing the "issue * * * [of] the order and allocation of proof in a *private, non-class action* challenging employment discrimination" (411 U.S. at 800; emphasis added), and that even in that context this showing "is not necessarily applicable in every respect to differing factual situations" (411 U.S. at 802, n. 13). *Franks,* however, involved a finding of a pattern and practice of discrimination in a suit by class plaintiffs; and the Court in that context stated that, should *defendant* attempt to prove that a minority individual was not "in fact discriminatorily refused employment", evidence of a lack of vacancies or a lack of qualifications "would of course be relevant" (424 U.S. at 733, n. 32). Here the court of appeals held, in the presence of a pattern and practice finding, and a seniority system which perpetuates the discrimination, that incumbent employees could not be excluded from relief merely because they had not applied for a vacant job (which would have been, and generally have been perceived to be, discriminatorily unavailable to them

under the Company's practice), as long as they were qualified and have a present desire to transfer.

This Court has never established an immutable rule for identifying the victims of discrimination in a Title VII suit; nor should it. The propriety of various logical inferences and the necessity for various kinds of specific proof must necessarily depend on the type of proceeding (class or individual), the employment practice discriminatorily exercised (new employment or transfer) and the particular factual circumstances of each case. Cf. *McDonnell Douglas Corporation* v. *Green, supra,* 411 U.S. at 802, n. 13; *McDonald* v. *Santa F. Trail Transportation Co.,* No. 75–260, decided June 25, 1976, slip op. 5, n. 6. For example, requiring an actual application for a vacant position may in some factual situations be unreasonable and defeat the congressional mandate to provide a "whole remedy" to discrimination. Three factors combine to make the vacancy and application requirement unnecessary here: (1) the presence of a pattern and practice of discrimination over an extended period of time in which numerous vacancies normally would occur, (2) the fact that the class is limited to a specific category of incumbents, not all of whom necessarily will desire or qualify for a transfer when an appropriate vacancy occurs, and (3) the presence of a seniority system perpetuating the discriminatory pattern.

The application and vacancy requirements may often be inappropriate in a Title VII pattern and practice suit even though both requirements may be entirely necessary in an individual discrimination claim. In an individual claim, the inquiry as to in-

jury focuses on a particular point in time where the presence of an application and a vacancy from which the applicant was excluded is the typical indication of the fact of injury. By contrast, a pattern or practice suit is not fixed at any temporal point, but by its nature refers to regularized behavior over time. The repetitious and continuing quality of the pattern and practice has the practical effect of deterring both initial and follow-up applications which in turn makes it more unlikely to match an application with an opening.

The courts have recognized that a practice of systematically excluding minorities from consideration for certain categories of jobs inevitably deters those minorities from applying for those jobs even though they are desirous of obtaining them.[68] As the Fifth Circuit explained in *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 451:

> If an employee realizes full well that blacks simply are not hired as road drivers, why should he bother to apply? Certainly a few, such as Bing, have the courage to fight "the system", but it is equally certain that others

[68] *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 451 (C.A. 5); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 369 (C.A. 8); *Jones* v. *Lee Way Motor Freight, Inc., supra*, 431 F.2d at 247; *Hairston* v. *McLean Trucking Co., supra*, 520 F. 2d at 231–232; *Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F. 2d 301, 316 (C.A. 6), petitions for certiorari pending, Nos. 75–220, 75–221, 75–239, 75–393; *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 55 (C.A. 5), certiorari granted, May 24, 1976, Nos. 75–651, 75–715, 75–718; *Sagers* v. *Yellow Freight System, Inc.*, 529 F. 2d 721, 731 (C.A. 5); *United States* v. *Pilot Freight Carriers, Inc.*, 6 EPD ¶8766, p. 5344, 6 FEP Cases 280, 284 (M.D. N.C.); *Love* v. *Pullman Co.*, 11 EPD ¶10,858, p. 7621, 12 FEP Cases 332, 343 (D. Colo.).

> must have been intimidated and discouraged by Roadway's discriminatory practices.

To require that minority employees have applied for transfer in order to qualify for relief penalizes them for failing to perform what, as they knew and the proof demonstrates, would have been a vain and useless act.

The fact that the class of affected individuals is composed of incumbent minority employees makes it especially likely that they both knew of, and responded to, the pattern of segregated jobs; indeed there is evidence in the record to that effect.[69] The fact that the case is limited to incumbents has other obvious implications. Absent discrimination, it is reasonable to assume that vacant line driver jobs would have been offered first to this qualified pool of available, experienced individuals without any necessity that they apply; hence, they may properly be treated as constructive applicants for all job vacancies which became available after they were hired. The presence of a limited incumbent class eliminates the need for sifting out the affected class from the minority public at large, one of the functions that the application

[69] For example, John Batchelor, a black city operations employee at the Atlanta terminal, testified that he did not seek extra line driver runs even though he was interested in such work because he was aware that other black city operation employees had sought such runs and had been refused (summary of dep. of John Batchelor, p. 2 in Pl's Ex. 240 (A. 277–278)). Extra line driver runs at the Atlanta terminal led to regular line driver positions for white city operation employees, including employees with less seniority than Batchelor (summary of dep. of John Batchelor, *supra*, p. 2; Pl's Exs. 102, 104 (to Atlanta deps.); summary of dep. of Jackson B. Stroud, Operations Manager (Atlanta), pp. 4–5 in Pl's Ex. 240 (A. 277–278)).

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requirement normally performs. In a case like *Franks* where hiring discrimination is claimed by non-incumbents, applications by members of the excluded minority group serve to distinguish them from all other members of that group. Here there is no difficulty in identifying the members of the class subject to discrimination; they are incumbent employees employed by the company in less desirable jobs during the period of discrimination.

Finally, the presence of a seniority system reinforcing the discriminatory hiring practice is an additional factor making a vacancy and application requirement inappropriate here. Once the incumbents began to accrue time at the company, the seniority system acted as an added deterrent to any transfer application. Even when the pattern of discrimination had ceased, incumbent minority employees would be unlikely to apply for transfer to traditionally white jobs because they would forfeit all of their competitive status seniority and therefore their job security.[70]

The court's ruling does not establish an automatic racial preference for all minority employees. The class is pared down at the outset to incumbents rather than non-employed applicants, or potential applicants, from the community. To obtain the class relief, the incumbent must also have been qualified for a line

[70] *Sabala* v. *Western Gillette, Inc.*, *supra*, 516 F.2d at 1264; *Hairston* v. *McLean Trucking Co.*, *supra*, 520 F.2d at 231–232; *United States* v. *N. L. Industries, Inc.*, *supra*, 479 F.2d at 360.

driver job during the time the Company was discriminating in the employment of line drivers. In addition, he must presently be qualified and possess a present desire to transfer to his rightful place job (A.P. 95–96).[71]

Finally, the Company must have been unable to prove through relevant evidence, other than the lack of an application, that he was not, in fact, a victim of racial discrimination. Admittedly, the standard that the court of appeals found proper for this case does not provide the precision in the identification of a victim that may be required in an individual discrimination suit, but it is identification with a fair degree of specificity. More importantly, it may be the fairest approximation of fact of injury that can be obtained in the context of the pattern of discrimination demonstrated here. The contrary rule, requiring actual applications for vacancies, would permit the discriminating party to benefit from a pattern and practice so pervasive that it discouraged applications by qualified incumbents.

The burden required of affected minority individuals who seek the benefits of class relief should be judged in light of the limited practical impact on the Company and innocent non-minority employees should an enlarged number of incumbents achieve designation as victims of discrimination. The Company's back

[71] It is unlikely that an employee with a present desire to transfer would not have transferred to a line driver position in the past had he not been precluded by discrimination and by penalties imposed on transfer by the seniority system.

pay financial burden was set by the consent decree and will not be affected by the number of individuals obtaining relief (A.P. 91–92). The legitimate business interests of the Company will not be interfered with, since no individual will be permitted to transfer to a line driver position unless he is presently qualified under objective standards established by the consent decree (A.P. 96–97, 34–35). See *Franks, supra,* 424 U.S. at 772, n. 31. Nor will innocent non-minority employees suffer substantial injury. No non-minority employee loses any seniority which he has already gained; no non-minority employee is bumped from his job. They and minority employees who obtain relief will simply compete for future vacancies utilizing neutral seniority principles.[72]

While it may be true that not all members of the affected class would have bid for and obtained line driver jobs, it is also true that not all members of the affected class will wish to transfer or will be found qualified for such jobs even after modification of the seniority system. *United States* v. *Bethlehem Steel Corp., supra.* As this Court has recognized, it is not probable in instances of class-based relief that all members of the class will actually apply for and obtain relief. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 776, n. 36. Extensive experience with modifications of seniority systems strongly suggests that advancing age and other problems may cause many fewer members of the affected class to be able to transfer than would have been expected had such positions initially been available to all regardless of race and national origin.

[72] In this regard, the seniority carryover date for the minority transfers is designed to approximate the seniority the minority employees would have had absent discrimination; they will not be given any seniority for time worked at the Company prior to their (actual or constructive, if delayed by discrimination) obtaining of the requisite qualifications for line driver.

The absence of concrete indicators like applications for specified vacancies, of course, forces reliance upon inferences drawn from the full range of facts before the court. As a result, various courts have utilized diverse qualification date formulae in implementing rightful-place principles within the particular factual context that each faces (T.I.M.E.–D.C. Br., pp. 28–29). A violation of Title VII may itself be proven from evidence that implies, rather than explicitly demonstrates, the existence of unlawful discrimination. Once a pattern of discrimination against a class has been established, there is greater reason to permit reasonable inferences to be drawn from the evidence, in order to accord an effective remedy.

The court of appeals concluded from the facts of this case that it would be reasonable to infer that those incumbents who express a present desire to transfer would have chosen to do so when they became qualified, and would, absent discrimination, have obtained such a position when the next vacancy arose in that category. This is as sound a conclusion as the reasonable inferences recognized by this Court in constructing seniority relief in *Franks,* notwithstanding the dissenting observation that such an award was based upon the fiction that the discrimination victim had worked since he was denied employment, and upon the "assumption that nothing would have interrupted

his employment, and that his performance would have justified a progression up the seniority ladder." 424 U.S. at 792 (Mr. Justice Powell, dissenting); see also 424 U.S. at 767–768. Where, as in this case, adequate Title VII relief cannot be accorded without the fair use of inferences informed by the entire factual context, the court of appeals was correct in holding that injury should reasonably be inferred in the absence of an actual application for a vacancy.

IV

THE COURT OF APPEALS CORRECTLY HELD THAT THE RIGHTS OF MEMBERS OF THE AFFECTED CLASS TO COMPETE FOR FUTURE VACANCIES AT THEIR HOME TERMINALS OR ELSEWHERE SHOULD NOT BE SUBORDINATE EITHER TO THE RIGHTS OF EMPLOYEES TRANSFERRING FROM OTHER TERMINALS, OR TO THE RIGHTS OF EMPLOYEES WITH LESS SENIORITY WHO ARE ON LAYOFF

Petitioners challenge two additional rulings by the court of appeals applying rightful-place principles to this factual record, both of which concern the rights of members of the affected class to compete against line drivers (Teamsters Br., pp. 54–55; T.I.M.E.-D.C. Br., pp. 34–35). The first ruling establishes a preference for individual discriminatees awarded carryover seniority over employees from other terminals for the purpose of filling future vacancies at the discriminatee's home terminal (A.P. 42). The second directs that members of the affected class may compete against any line driver on layoff for a particular vacancy (other than a purely temporary vacancy) on the basis of carry-over seniority (A.P. 41). Both decisions

require temporary modification of collective bargaining agreements (A.P. 81, para. V, 99 #10) with respect to member of the affected class in an effort to make relief more effective in terms of what the court of appeals found to be "the practical realities and necessities inescapably involved in reconciling competing interests * * * ." *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 777–778, n. 39.

The court of appeals provided a preference for members of the affected class seeking to bid on home terminal vacancies, as against drivers from other terminals, as the most appropriate way to approximate rightful-place relief without needless delay.[73] A home terminal preference simply permits members of the affected class a better chance to obtain a line driver position at their home terminals—the places where they would have been hired in the absence of discrimination. While this home terminal preference represents a modification of the Southern Conference

[73] At the Atlanta terminal, for example, approximately 22 line drivers, more than ⅓ of the 57-person line driver complement there as of January 1970, had transferred in from other terminals pursuant to the modified seniority system (summary of dep. of Jackson B. Stroud, Operations Manager (Atlanta), pp. 6–7, in Pl's Ex. 240 (A. 277–278); Pl's Ex. 99 (to Atlanta deps.) (line driver seniority roster)). Although no new line drivers had been hired "off the street" in Atlanta since 1966, a number of the line drivers who transferred in filled actual job openings (summary of dep. of Jackson B. Stroud, *supra*, pp. 4, 7–8). Thus, if members of the affected class at Atlanta were not given as part of their relief preference in filling future vacancies there ahead of line drivers transferring in from other terminals, it could well be many years before they would have an opportunity to fill a future vacancy at that terminal.

seniority system, it is, in fact, consistent with the general rules of bidding at home terminals.[74] Application of the Southern Conference rule might prevent discriminatees from ever exercising their seniority rights to obtain line driver jobs. While the home terminal preference relief implicates the interest of non-minority (and perhaps even of some minority) drivers who may wish to take advantage of what would otherwise be their Southern Conference transfer rights, it properly applies to the circumstances here, the principle that "a sharing of the burden of the past discrimination is presumptively necessary." *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 777.

Similarly, application of rightful-place principles requires that laid-off non-minority employees with less seniority not be given priority over discriminatees with longer accrued seniority.[75] If a member of the

[74] While we recognize that affected class members in the Southern Conference, under the court's ruling (A.P. 43), may exercise carryover seniority rights at other terminals, that right is subordinated to the rights of class members already at those terminals, and is likely to have little practical effect. It does, however, provide some prospect for ultimate relief for individuals whose relief at their home terminals may be long delayed for lack of vacancies (possibly due to the previous transfer in of line drivers from other terminals under the Southern Conference rule).

[75] The court's decision to grant affected minority employees rightful-place seniority relief does not involve "bumping" of incumbent white line drivers. In accordance with applicable collective bargaining agreements, currently employed line drivers bid on regular runs and runs off the extra board at least once every 12 months (A. 825–826). Under this system permanent vacancies occur only when a road driver must be replaced or

affected class is senior to the laid-off non-minority employee, he should surely have a right to bid for the vacancy which absent discrimination he might previously have filled. To deny those bidding opportunities to members of the affected class in favor of their less senior white competitors on layoff would needlessly perpetuate past discrimination by limiting the number of job openings for which victims of discrimination may compete, thereby depriving them of the opportunity to reach their rightful place within a reasonable period.[76]

when an increase in operations creates a new position. A minority employee who obtains class relief will be able to bid for jobs only where a vacancy has occurred, and then he must compete with all other drivers on the basis of their seniority (A. 825). Moreover, minority class members will not be permitted to bid against drivers who have been only temporarily laid off. While the court of appeals has not specified the definition of temporary lay offs, that can properly be accomplished on remand. See *Freeman* v. *Motor Convoy, Inc.*, 409 F. Supp. 1100, 1126 (N.D. Ga.); *United States* v. *Florida East Coast Railway Co.*, 7 EPD ¶ 9218, p. 7067, 7 FEP Cases 540, 556 (M.D. Fla.).

[76] *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 118 (C.A. 5); *United States* v. *Jacksonville Terminal Co., supra,* 451 F. 2d at 450–451; *Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 358 (C.A. 5); *United States* v. *Chesapeake and Ohio Ry. Co., supra,* 471 F. 2d at 589. See also *Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201, 1205 (C.A. 2), certiorari denied, 411 U.S. 931.

There is, in sum, no reason to modify the court of appeals' careful determination as to the "'special blend of what is necessary, what is fair, and what is workable,'" in this case. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 778, n. 39."

[77] The Teamsters do not pursue one of the questions it presented in its petition for a writ of certiorari, *i.e.*, whether it was proper to award seniority relief in the absence of the Teamsters locals which formally signed the collective bargaining contracts with the Company, contending that it is premature at this time (Teamsters Br. 3, n. 3.) The record (see pp. 11–13, *supra*) and the case law amply support the determination of both courts below that the Teamsters International was a proper party to represent and defend the seniority status of its members and that the locals were not indispensable parties. *United States* v. *Navajo Freight Lines, Inc., supra,* 525 F.2d at 1321–1322; *Sagers* v. *Yellow Freight System, Inc., supra,* 529 F.2d at 737–738; *United States* v. *Pilot Freight Carriers, Inc.,* 54 F.R.D. 519, 521–522 (M.D. N.C.); *United States* v. *East Texas Motor Freight System, Inc., supra,* 10 EPD ¶10,345, p. 5416, 10 FEP Cases 973, appeal pending, No. 75–3332 (C.A. 5); *Johnson* v. *Ryder Truck Lines, Inc.,* 10 EPD ¶10,535, pp. 6240–6241, 12 FEP Cases 895, 903 (W.D. N.C.); *United States* v. *Terminal Transport Co.,* 11 EPD ¶10,704, pp. 6936–6937 (N.D. Ga.); *Cathey* v. *Johnson Motor Lines, Inc., supra,* 398 F. Supp. at 1116; *Freeman* v. *Motor Convoy, Inc., supra,* 409 F. Supp. at 1108–1112; *United States* v. *Lee Way Motor Freight, Inc.,* 7 EPD ¶9066, pp. 6497–6498, 7 FEP Cases 710, 747 (W.D. Okl.). See also *United States* v. *Roadway Express, Inc.,* 457 F.2d 854, 857 (C.A. 6).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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